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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943. No. 365

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ADRIAN ETTELSON, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

METROPOLITAN LIFE INSURANCE COMPANY, Petitioner, *vs.* ADRIAN ETTELSON, *et al.*, Respondents.	Petition for Certiorari.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Metropolitan Life Insurance Company respectfully shows unto your Honors:

A.

Summary Statement of the Matter Involved.

Respondents sued at law in the New Jersey Supreme Court to recover the proceeds of certain policies of insurance. Petitioner removed the case to the Federal Court for the District of New Jersey. Upon the transcript being filed, respondents demanded a jury trial. Thereafter petitioner filed its answer and included therein a counterclaim (Civil Rule of Procedure No. 13 (a)), seeking the equitable affirmative relief of rescission and cancellation of the policies

(R. page 28a). The counterclaim alleged that the insured had made material statements false in fact with respect to his health and medical attendance (R. pages 30a to 33a). There was no allegation that the statements were knowingly and intentionally made.

Respondents moved to strike this counterclaim on the ground of (a) adequate remedy at law and (b) failure to state a claim upon which equitable relief can or should be granted by a Federal Court (R. page 50a).

The District Court denied the motion, 42 Fed. Supp. 488, and the respondents appealed to the Circuit Court of Appeals for the Third Circuit. The petitioner moved the Circuit Court of Appeals to dismiss the appeal on the ground that the order denying the motion to strike was not an appealable order (R. page 65). The Circuit Court of Appeals certified that question to this Court (R. pages 66-68). This Court held that the order was appealable (R. page 69). 317 U. S. 188. Upon the argument of the appeal before the Circuit Court of Appeals, that Court reversed the District Court (R. page 76).

B.

Basis of Jurisdiction.

The statute under which jurisdiction is conferred is Section 240 of Judicial Code as amended by the Act of February 13, 1925, (C. 229, 43 Stat. 936, 938, 939; U. S. C. A. Title 28, Section 347).

C.

Reasons Relied Upon for Allowance of Writ.

a. The Circuit Court of Appeals held that *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, does not apply; that the ruling in that case has no bearing on the enforcement of the petitioner's equitable rights of cancellation and rescission under local law as disclosed by its counterclaim, and that the enforcement of these rights under the State law is not a matter of substantive law.

b. The Circuit Court of Appeals denied the petitioner the substantive right under Federal law and procedure to have its equitable claim for cancellation and rescission determined in a proceeding in equity.

c. The Circuit Court of Appeals in effect held that the enforcement of the petitioner's right to the affirmative equitable relief of cancellation and rescission for innocent misrepresentations under the rules of Federal procedure is not the subject of a hearing by the Court sitting in equity, but that whatever relief is granted must be through the medium of a trial by court and jury.

d. The Court reversed the District Court and ordered the case remanded for trial on the counterclaim by the court and jury.

In so holding the Court:

(a) Decided an important question of local law in a way probably in conflict with applicable local decisions.

(b) Decided a Federal question of substance in a way probably not in accord with applicable decisions of this court.

(c) Has so far sanctioned a form of procedure by the lower court constituting such a departure from the accepted and usual course of judicial proceedings as to require the settlement of the procedure by this Court for the guidance of the lower courts and of litigants therein and their counsel.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7933, *Adrian Ettelson, et al.,* plaintiffs-appellants v. *Metropolitan Life Insurance Company,* defendant-appellee and that the judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will every pray.

METROPOLITAN LIFE INSURANCE COMPANY,

By CONOVER ENGLISH,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1943. No. .

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ADRIAN ETTELSON, *et al.*,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The Opinions of the Courts Below.

The opinion in the Circuit Court of Appeals is not yet reported (R. page 71). The opinion of the District Court is reported in 42 Fed. Supp. 488.

In addition, the opinion of this Court on question certified is reported in 317 U. S. 188.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code as amended by the Act of February 13, 1925, (U. S. C. A. Title 28, Sec. 347).

II.

The date of the judgment to be reviewed is June 29, 1943 (R. page 76).

III.

The grounds on which jurisdiction in this Court is invoked are:

a. The judgment of the Circuit Court of Appeals reversed the District Court and ordered the enforcement of petitioner's equitable right of cancellation and rescission of the policy under the counterclaim to be proceeded with before the court and jury in violation of its substantive right to a hearing before the court, sitting in equity. This decision is contrary to the ruling of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and determines an important question of local law and procedure in a way in conflict with applicable local decisions. *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202.

b. In deciding that the ruling in *Erie Railroad Co.* v. *Tompkins, supra,* does not apply, the Circuit Court of Appeals has ignored the objective and policy disclosed in that case as bearing on the substantive rights of petitioner with respect to the burden of proof and the procedure under local law to enforce its equitable right to cancellation for innocent misrepresentations. *Cities Service Co.* v. *Dunlap,* 308 U. S. 208; *Sampson* v. *Channell,* 110 Fed. 2nd (C. C. A. 1) 754, page 756; cert. denied 310 U. S. 650.

c. The decision of the Circuit Court of Appeals is not in accord with applicable decisions of this Court. The peti-

tioner is demanding relief available to it in equity only, namely, a decree of cancellation of the policies. *Radio Corporation of America* v. *Raytheon Mfg. Co.*, 296 U. S. 459, page 462.

d. The decision of the Circuit Court of Appeals has created a situation which requires the settlement of the procedure by this court. The forum of a judge and jury cannot render a decree of cancellation. Petitioner in its counterclaim seeks more than to successfully defend the plaintiff's demand for money damages. It seeks the equitable remedy of cancellation, on a showing of material misstatements of facts innocently made and without fraudulent intent. If the decision of the Circuit Court of Appeals stands how shall the court and counsel in this, and subsequently similar cases proceed! How can the rights of a party seeking cancellation be enforced in the Federal District Court! A situation is clearly presented where questions of public importance are invoked which it is in the public interest to have decided by this court. *Magnum Co.* v. *Coty*, 262 U. S. 159.

Statement of the Case.

The case has been stated under heading "Summary Statement of the Matter Involved" in the Petition, page 1, and is not here repeated.

SUMMARY OF ARGUMENT.

1. The local (New Jersey) law enforces the equitable right of cancellation of a contract for fraud, only through an equity proceeding. The proof need only be that the material statements were false in fact, though innocently or unintentionally made. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, governs.

2. The Federal Court on the trial of the issue raised by petitioner's counterclaim must do exactly what the State Court sitting in its place would do.

3. The effect of the ruling of the Circuit Court of Appeals is to deny the petitioner a substantive right under Federal law and procedure.

4. The ruling of Circuit Court of Appeals that the equitable issue presented by the counterclaim should be tried by the court and jury constitutes such a departure from the accepted and usual course of judicial proceedings as to require settlement of the procedure by this Court.

ARGUMENT.

I.

A.

The local or New Jersey law enforces the equitable right of cancellation only through an equity proceeding.

The Circuit Court of Appeals held that *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, "does not affect the procedure in the pending case" (R. page 74).

Petitioner sought the cancellation of the policies—a purely equitable right. There is a clear distinction between what elements must be proved to establish a legal defense of fraud as opposed to affirmative equitable relief for fraud. This amounts to something more than procedure. Under the law of New Jersey, the Court sitting in equity will grant the equitable relief of cancellation where the fraud consists of material representations false in fact, made without either knowledge of their falsity or intent to deceive; while on the other hand, the Court sitting as a court of law, will recognize fraud as a defense to an action to enforce payment under the contract only where the falsity was uttered knowingly and intentionally. The court of law has no power to decree cancellation.

In *Commercial Cas. Ins. Co.* v. *Southern Surety Co.,* 100 N. J. Eq. 92; aff'd on opinion 101 N. J. Eq. 738; 135 Atl. Rep. 511, the Court said at page 96:

> "In equity an untruthful representation of a material fact, though there be no moral delinquency, is

> deemed to be fraudulent. (Citing cases.) The law courts not having as yet taken upon themselves to relieve against wrongs resulting from misrepresentations fraudulent in conscience only, courts of equity continue to perform that function."

In *Metropolitan Life Ins. Co.* v. *Lodzinski,* 124 N. J. Eq. 357; 1 Atl. 2nd 859, the New Jersey Court of Errors and Appeals held at page 359:

> "It is true—as has been established by a long line of decisions—such rescission may be made in equity upon proof of reliance on material representations untrue in fact, without proof of conscious or intentional fraud."

In accord, *N. Y. Life Ins. Co.* v. *Weiss,* 133 N. J. Eq. 375; 32 Atl. R. (2) 341.

Hence the local law in New Jersey is:—at law, one must prove that the representations were false and were knowingly made, to sustain a defense, while in equity one need prove only that the representations were false in fact, although innocently made, to secure a cancellation of the contract. And it is settled by local law that the right to the affirmative equitable relief of cancellation and rescission of a contract can only be had in equity.

Metropolitan Life Ins. Co. v. *Tarnowski,* 130 N. J. Eq. 1; 20 Atl. Rep. (2) 421.

Commercial Cas. Ins. Co. v. *Southern Surety Co.,* 100 N. J. Eq. 92; aff'd on opinion, 101 N. J. Eq. 738; 135 Atl. Rep. 511.

Schoenfeld v. *Winter,* 76 N. J. Eq. 511; aff'd on opinion 79 N. J. Eq. 219; 74 Atl. Rep. 975.

In the *Schoenfeld* case the Court said at page 512:

> "In order to set aside a contract founded in fraud, it is only necessary in equity to prove that the representation upon which the action is founded is false, that it is material, and that damage has ensued; while at common law the proof must go to the extent of satisfying the jury that the defendant *knew* that the statement relied upon was false. It will therefore be seen at a glance that the remedy in equity is much broader and much more efficient than the remedy at law could be."

A mere defense to an action which prevents the plaintiff from recovering the judgment he seeks is not so full or ample or adequate a remedy as that of cancellation which forever places it beyond the power of the plaintiff to enforce or attempt to enforce his contract. In *New York Life Ins. Co.* v. *Steinman,* 103 N. J. Eq. 403; 143 Atl. Rep. 529, the Court said at page 404:

> "* * * the existence of a complete defense, based on fraud, in a court of law, falls short of and does not ordinarily constitute such an adequate remedy for the defendant as should impel a court of equity to refuse to entertain a bill filed by the defrauded party for cancellation and surrender of the contract, since the opportunity to make that defense may be lost, or the ability to make it may be weakened, by studied delay of the other party; and further, that mere defense at law does not embrace the equitable relief of cancellation or surrender of a contract."

B.

The question of whether scienter is a necessary element is closely allied with the questions of the burden of proof and procedure.

Since the plaintiff in a suit in equity for the cancellation of a contract under New Jersey law is relieved of the necessity of proving that the false statements were knowingly and purposely made, the questions of the burden of proof and procedure under local law become matters of substantive law.

In *Sampson* v. *Channell,* 110 Fed. 2nd (C. C. A. 1) 754, cert. denied, 310 U. S. 650, the Court said at page 756:

> "Inasmuch as the older decisions in the federal courts, applying in diversity cases the federal rule as to burden of proof as a matter of 'general law' are founded upon an assumption no longer valid since Erie Railroad Co. *v.* Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, their classification of burden of proof as matter of substance should be re-examined in the light of the objective and policy disclosed in the Tompkins case."

Hence matters relating to the burden of proof and procedure may under local law become matters of substantive law.

Cities Service Co. v. *Dunlap,* 308 U. S. 208, was a bill in equity filed in the Federal District Court to remove a cloud on title to land. The Court below held that the doctrine of *Erie Raliroad Co.* v. *Tompkins* did not apply. This Court reversed and said at page 212:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule."

In *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, which was governed by the Merchant Marine Act rather than the local law, this Court held that the right of a seaman suing in a Pennsylvania Court under section 33 of the Merchant Marine Act to be free from the heavier burden of proof imposed by Pennsylvania law upon one attacking the validity of a written release is a right of substantive law inherent in his cause of action.

II.

This Court has held that in diversity of citizenship cases, except where a Federal statute governs, a Federal Court, whether trial or appellate, must do exactly what a State Court sitting in its place would do with the questions before it.

In *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, this Court said that the doctrine of *Erie Railroad Co.* v. *Tompkins* applies, though the question of construction arises not in an action at law, but in a suit in equity.

In *New York Life Ins. Co.* v. *Jackson,* 304 U. S. 261, *Rosenthal* v. *New York Life Ins. Co.,* 304 U. S. 263, *Hudson* v. *Moonier,* 304 U. S. 397, and *Mutual Benefit H. & A. Association* v. *Bowman,* 304 U. S. 549, this Court remanded

the case to the courts below so that they might ascertain and apply the applicable state law.

In *Wichita Co.* v. *City Bank,* 306 U. S. 103, which involved the effect of a prior decision by the Texas Supreme Court as bearing upon the "law of the case", it was held that the Circuit Court of Appeals should give the same effect to the prior decision that a Texas state court would do.

In *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, the District Judge, who had reversed the Master in allowing interest on the accounting, was upheld by this Court in applying the law of Pennsylvania.

In *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, which was a suit for equitable relief, this Court held that in a diversity of citizenship case, the Court must follow the decisions of the New Jersey Court of Chancery in the absence of any decisions on the point by the Court of Errors and Appeals, and said at page 180:

> "* * * It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. * * *"

The same rule was reiterated in *West v. Amer. T. & T. Co.,* 311 U. S. 223, in *Six Companies* v. *Highway District,* 311 U. S. 180, and in *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464.

In *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, the District Court decided in accordance with the then existing

state decisions. Between its judgment and the hearing in the Circuit Court of Appeals, the State Supreme Court reversed its earlier decisions and laid down a contrary rule of law. This Court held that the Circuit Court of Appeals should have applied the state law, as existing at the time the case was before it, even though the District Court's decision was correct under the state law at the time it was made. Mr. Justice Reed stated at page 453:

> "While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law."

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, this Court stated the principal question to be (Page 494) "whether in diversity cases the Federal Court must follow conflict of laws rules prevailing in the states in which they sit", and answered the question yes, saying at page 496:

> "Any other ruling would do violence to the principle of uniformity within a state, upon which the Tompkins decision is based."

To the same effect is *Griffin* v. *McCoach*, 313 U. S. 498.

Petitioner's case is not one where Federal Law must govern as in *Prudence Corp.* v. *Geist*, 316 U. S. 89, where this Court held the Bankruptcy Act, not local law, applied; or as in *B. & O. R. R. Co.* v. *Kepner*, 314 U. S. 44, where this Court held the Federal Employers Liability Act applied; or as in *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173.

III.

The effect of the ruling of the Circuit Court of Appeals is to deny the petitioner a substantive right under Federal law and procedure.

The Circuit Court of Appeals held in effect that whatever relief the petitioner is entitled to under its counterclaim is obtainable in a trial by court and jury. In so holding, the Court failed to distinguish between the right to defend at law and the right to affirmative equitable relief in equity in a case where the fraud consists of innocent misrepresentations.

The character of relief to which a party is entitled is a matter of substance. In *Black & Yates* v. *Mahogany Ass'n.*, 129 Fed. (2) 227 (C. C. A. 3, cert. den. 63 Sup. Ct. 76), the Court held at page 233:

> "As to substantive rights the cases are clear that the rules of substantive law to be applied in a federal equity court in a diversity case are those which would be applied in a state court sitting in the same state. This is a logical and indeed necessary extension of the principle of Erie R. Co. *v.* Tompkins, *supra.*" (Citing many of the cases *supra* under Point II.)

The correct application of the rule of procedure in affording relief is also a matter of substance. The Circuit Court of Appeals recognized that it is a close question as to whether the petitioner's rights under *Erie Railroad Co.* v. *Tompkins, supra,* are substantive or procedural (R. pages 72-73). Clearly they are substantive. Whether the State law or Federal law be applied, the enforcement of equitable

rights and remedies can only be through an equity, as opposed to a law, procedure, and this is a matter of substance.

We have seen that under local (New Jersey) law, the cancellation and rescission of contracts is only by a proceeding in equity. Point I A *supra*. The same must be true in the Federal Court, whether the question is considered strictly under Federal procedure or under *Erie R. R.* v. *Tompkins, supra.*

Where a United States District Court has jurisdiction in the sense of power to adjudicate a controversy, it has the same authority to grant equitable relief as that exercised by the English Court of Chancery in 1789.

> *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, 568.
> *Gordon* v. *Washington*, 295 U. S. 30, 36.
> *Waterman* v. *Canal-Louisiana, Etc., Co.*, 215 U. S. 33, 43.

In *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, this Court, in commenting on Section 24 (1) of the Judicial Code, 28 U. S. C. Section 41 (1) said at page 568:

> "The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries". (Citing cases.)

In *Whitehead* v. *Shattuck*, 138 U. S. 146, referring to Section 267 of the Judicial Code, 28 U. S. C. Section 384, this Court said at page 150:

> "The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England."

In *Radio Corporation of America* v. *Raytheon Mfg. Co.*, 296 U. S. 459, this Court laid down the rule that where equitable relief is demanded, the equitable issue must be disposed of at the beginning, and said at page 462:

> "True there are times when a release, unassailable at law, is voidable in equity, and in equity only. If the plaintiff were demanding relief upon that basis, the equitable issue would have to be disposed of at the beginning. American Mills Co. *v.* American Surety Co., 260 U. S. 360, 363; Liberty Oil Co. *v.* Condon National Bank, 260 U. S. 235, 242; Enelow *v.* New York Life Insurance Co., 293 U. S. 379, 383; Adamos *v.* New York Life Insurance Co., 293 U. S. 386. With the parties so arrayed, the situation would be the same as if a bill in equity had been filed to set aside the release, the suitor thus removing a bar to a recovery. Enelow *v.* New York Life Insurance Co., *supra*, p. 382. But the plaintiff disclaims any title to relief upon that basis."

On the contrary the petitioner here is demanding relief in equity.

It is settled by this Court that Federal Courts, sitting in equity, have power to and do act to cancel contracts obtained by fraud.

> *Smith* v. *Richards*, 38 U. S. (13 Peters) 26;
> *Turner* v. *Ward*, 154 U. S. 618.

A policy of insurance obtained by material statements, false in fact, but innocently or unintentionally made, is unassailable at law in New Jersey. Such contract can only be successfully attacked or defended against in equity. The motion to dismiss (R. page 50a) impliedly admits this. The Circuit Court of Appeals assumes it (R. page 72). This is a peculiarity of local procedure which this Court will recognize. *Atlas Ins. Co.* v. *Southern, Inc.*, 306 U. S. 563, at page 572. The Federal Court, applying local law under *Erie Railroad Co.* v. *Tompkins, supra,* must of necessity exercise its inherent equity power the same way.

IV.

The decision of the Circuit Court of Appeals is bound to work confusion in the practice of the lower courts and the procedure requires settlement by this Court.

The counterclaim here and any similar bill or counterclaim for the equitable remedy of cancellation and rescission based on innocent misrepresentations does and will involve more than a mere defense to the fraud. It may be, as the Circuit Court of Appeals holds, that a defense of fraud whether "legal" or "equitable" can be availed of at law in certain jurisdictions without distinction, although this is not so in New Jersey. In that State unintentional fraud or "honest misrepresentations" offer no defense at law and can only be availed of in equity. See Point I A *supra.*

In none of the cases cited by the Circuit Court of Appeals (R. page 75), namely *MacLanahan* v. *Universal*

Ins. Co., 1 Peters 170; *Carpenter* v. *American Ins. Co.*, 5 Fed. Cas. No. 2428; 1 Story CC 57; *Hazard* v. *New England Marine Ins. Co.*, 11 Fed. Cas. No. 6282; 8 Peters 457; *Carrollton Furniture Mfg. Co.* v. *American Credit Indemnity Co.*, 115 Fed. 77; 124 Fed. 25, was there any demand for equitable relief. They were all actions at law where the fraud, whether intentional or unintentional, was held to constitute a defense. *The Carrollton Furniture Co.* case cited three New York cases, indicating that the local New York law recognized unintentional fraud as a defense at law. Not so in New Jersey.

The rule that "fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available", as laid down by this Court in *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203, page 212, is necessarily limited to conscious, not unintentional fraud, as in each of the cases cited to sustain the statement, the facts show the fraud to have been conscious and deliberate.

In the same *Stewart* case (300 U. S. at page 214), this Court said:

> " 'Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law'. Davis *v.* Wakelee, 156 U. S. 680, 688. To this must be added the danger that witnesses may disappear and evidence be lost. A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient". (Citing cases.)

This is in line with the rulings of the New Jersey Courts. In *Commercial Cas. Ins. Co.* v. *Southern Surety Co., supra,* the Court said (100 N. J. Eq. 97):

> "It may be that the complainants would not be able to prove that the misrepresentations were knowingly false, but could only prove that they were material and untrue—a defense in equity only. The complainants are not to be put to the hazard at law when the requirements in equity are less exacting". (Citing Schoenfeld *v.* Winter, 76 N. J. Eq. 511, aff'd on opinion 79 N. J. Eq. 219; 74 Atl. Rep. 975.)

See Counterclaim, par. 23 (R. page 36a).

Therefore, if the rule of the Circuit Court of Appeals stands, there will be two distinct procedures in the New Jersey jurisdiction with respect to the defense of unintentional or equitable fraud. That in itself is contrary to the spirit of *Erie Railroad Co.* v. *Tompkins, supra.* Confusion must necessarily arise in the Federal Court for the New Jersey District. How shall the judge proceed? Shall he instruct the jury that "innocent misrepresentations" constitute a defense. If so, he runs counter to the local law. Shall he instruct the jury that they may render a verdict that the policies be cancelled. If so, he ascribes functions to the jury which are contrary to established law and procedure, both State and Federal. If in the Federal Court suits to cancel contracts obtained by fraud must be tried by the court and jury, the court is shorn of its power to cancel such contracts in equity.

Is it not obvious that the public interest requires that these tangled questions be settled by this Court!

The Circuit Court of Appeals in its decision in this case has departed from the accepted and usual course of procedure in suits seeking the equitable affirmative relief of the cancellation of a contract for fraud.

Wherefore it is respectfully submitted that the writ of certiorari prayed for should be granted.

CONOVER ENGLISH,
Of Counsel for Petitioner.

Office - Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1943. No. 365.

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

ADRIAN ETTELSON, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

No. 365. October Term, 1943.

Metropolitan Life Insurance Company,
Petitioner,

vs.

Adrian Ettelson, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 42 Fed. Supp. 488 (R. p. 54a). The opinion of the Circuit Court of Appeals is reported in 137 F. (2d) 62 (R. p. 71).

Jurisdiction.

Petitioner has based its application for *certiorari** on the jurisdiction granted to this Court by Title 28 U. S. C. § 347.

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* All italics ours.

Statement of the Case.

The question presented by this case to the lower courts was whether, in an action pending to recover death benefits under certain policies of insurance to which the insurance company filed an answer setting up a series of defenses to the effect that the policies were obtained by the fraud of the insured and were void because of false statements made by him in the application therefor, the insurance company might also properly supplement its answer with a counterclaim asking for the equitable relief of cancellation and rescission of the policies on the ground of fraud of the insured, based on the same false statements in the application as are alleged in the answer.

In its answer (R. p. 15a) petitioner alleged several defenses of fraud and false representations. In its counterclaim for cancellation (R. p. 28a) it set forth the identical questions and answers relied upon as legal defenses except that the answers were now characterized as either *false* or *false in fact*. Both the District Court (R. p. 58a) and the Circuit Court of Appeals (R. p. 75) expressly held that the counterclaim did not plead special circumstances of a *quia timet* nature.

Accordingly both courts recognized (R. pp. 57a, 75) the applicability of the long-standing rule of this Court "that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available". *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 212 (1937). The District Court concluded, however, that *Erie R. Co.* v.

Tompkins, 304 U. S. 64, (1938), abrogated this rule in the Federal Court for the District of New Jersey because, under the system of separate law and equity courts in that state, relief by way of cancellation for unintentional misrepresentations was obtainable only in a state equity court (R. p. 60a). The District Court, following New Jersey procedure, ordered a hearing on the counterclaim "by the Court sitting in equity prior to the issue raised by the complaint filed by the plaintiffs in the action at law in which a jury trial has been demanded by the plaintiffs" (R. p. 62a).

The Circuit Court of Appeals reversed this order because (1) New Jersey procedure in allowing bills for cancellation of policies after a loss has occurred, traceable to the separation of law and equity courts, does not bind the Federal Court in that state to grant the same equitable remedy, legal and equitable defenses being available in the same proceeding, (2) Federal law determines trial procedure in the Federal courts, including the question of a hearing before the court alone or trial by jury, and (3) the rule of this Court concerning fraud in the procurement of insurance preserves the right of jury trial, with the assurance to petitioner of all substantive defenses available under New Jersey law, including those based upon honest misrepresentation as well as those predicated upon intentional fraud.

ARGUMENT.

POINT I.

The Circuit Court of Appeals did not decide any question of local law in a way probably in conflict with applicable local decisions.

A.

The lower court recognized that an insurer in New Jersey could defeat liability by showing that insurance was procured by material misrepresentations untrue in fact, without proof of conscious or intentional fraud.

1. *Distinction between legal and equitable fraud in New Jersey and the historical reasons therefor.*

Point I A of Petitioner's argument is devoted to an exposition of the New Jersey law to the effect that the Court of Chancery of that state will grant the equitable remedy of cancellation of a policy of insurance where the fraud charged consists of material representations, false in fact, made without either knowledge of their falsity or intent to deceive, while the law courts of that state will recognize fraud as a defense to an action on the policy only if the element of *scienter* is present. This general statement is subject to two significant refinements:

In *Metropolitan Life Ins. Co.* v. *Lodzinski*, 124 N. J. Eq. 357, 1 Atl. (2d) 859 (Ct. of E. & A. 1938), cited on page 10 of Petitioner's brief, it was held that the Court of Chancery is required to entertain a bill charging conscious fraud in the procurement of insurance and, upon final hearing, to

give relief of cancellation if complainant proves either the legal fraud charged in the bill or equitable fraud. This doctrine was reaffirmed recently in *N. Y. Life Ins. Co.* v. *Weiss*, 133 N. J. Eq. 375, 32 Atl. (2d) 341 (Ct. of E. & A. 1943).

In *Metropolitan Life Ins. Co.* v. *Babb*, 128 N. J. Eq. 391, 16 Atl. (2d) 548 (Ct. of Ch. 1940), it was held that where a bill for cancellation expressly disclaimed intentional fraud but the proofs established such fraud, relief should nevertheless be granted, since complainant was properly in equity and would have prevailed at law.

Thus petitioner has, in its various cases before the New Jersey courts, helped establish the full amplitude of the powers of the Court of Chancery over all claims of fraud, legal and equitable, in the procurement of insurance policies. This process was facilitated by two historical factors which have had radically different developments in New Jersey and in Federal jurisprudence:

(a) The historic *quia timet* grounds for the equitable remedy of cancellation have been, and still are, considered applicable to insurance controversies in New Jersey. The quotation on page 11 of petitioner's brief from *N. Y. Life Ins. Co.* v. *Steinman* is typical. The possibility of "studied delay" is real under the New Jersey procedural rule that a plaintiff in an action at law has an unqualified privilege to withdraw his case from the cognizance of the court by taking a voluntary non-suit at any time before the jury has retired for the consideration of their verdict. *Bauman* v. *Whiteley*, 57 N. J. L. 487, 489, 31 Atl. 982 (Sup. Ct. 1895).

As will be shown hereafter Federal procedure has developed so as to remove the foundations of most of the his-

toric *quia timet* grounds, resulting in the formulation of the narrower doctrine of "special circumstances" which may induce equitable intervention. *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937); *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563 (1939).

(b) Bearing in mind the continuous separation of the law and equity courts in New Jersey, *Eggers* v. *Anderson*, 63 N. J. Eq. 264, 49 Atl. 578 (Ct. of E. & A. 1901) points out an important difference between the New Jersey and the Federal courts in the administration of equitable remedies. After developing the breadth of the English doctrine of equity jurisdiction over every case of fraud, the Court said (p. 271):

> "Undoubtedly the American courts have not generally upheld so broad a jurisdiction, being influenced probably, and sometimes controlled, by enactments similar to the United States Judiciary act of 1789, which declared that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' But New Jersey is distinguished from her sister states by her adherence to the standards of the mother country respecting both rights and remedies in equity, and I know of no constitutional or statutory provision or judicial decision in this state which can be regarded as withholding or withdrawing from our court of chancery any jurisdiction possessed by its English prototype. True the jurisdiction of equity, in cases of fraud remediable at law, has not been much invoked, but that may be accounted for, in large degree, by the less expensive, equally efficient and in former times more speedy, remedy secured in the courts of law. When resorted to, however, the jurisdiction of equity has not been doubted."

Thus it is clear that the state cases cited above and under petitioner's Point I A rest upon an absence of constitutional or statutory limitations on the New Jersey Court of Chancery restricting the exercise by that court of the ancient equity powers derived from the mother country.

The Federal courts, on the other hand, were empowered to administer the same body of equitable principles and remedies, *subject, however, to the restrictions of the Constitution and the Judiciary Act.* It is of no moment whether the New Jersey Court of Chancery was rightly held to be untramelled in its power to deal with all kinds of fraud cases. What is important is that this Court has held the contrary as to the forum which Petitioner has chosen, as will appear *infra.*

2. *The Circuit Court of Appeals gave full recognition to the New Jersey substantive law.*

Petitioner advances as a ground for the granting of the writ of *certiorari* (Petition, p. 3) the contention that the Circuit Court of Appeals decided the local law in a way probably in conflict with applicable local decisions.

The opinion of the Circuit Court of Appeals shows this charge to be baseless. After adopting Petitioner's statement of the New Jersey law (R., p. 72, 137 F. (2d) 62, 64), the lower court said (R., p. 73, 137 F. (2d) 62, 64):

> "In this case, assuming that the New Jersey law is applicable to the contract set forth in the policies, the defendant is entitled to whatever defense to liability on its promise to pay upon the death of the insured which the New Jersey law gives it. If honest misrepresentations by the applicant for insurance void the policies the defendant is entitled to be free

> from the liability if it makes out that defense. But the fact that it is either entitled or compelled to go to an equity court in New Jersey to establish the facts which free it from liability does not mean that this limitation is applicable when the suit is brought in a court where so-called legal and equitable defenses are both available in the some proceeding."

Petitioner's real grievance, therefore, must be the refusal of the lower court to uphold its claim to the precise remedy obtainable in Chancery of New Jersey. This is the heart of the case, and the remainder of this brief will be devoted to the propriety of this ruling.

B.

The New Jersey equitable remedy of cancellation is based not on differences in burden of proof but upon the Chancery Court's concept of adequacy of the legal remedy, which the Federal Courts determine under Federal law.

Petitioner's discussion of burden of proof (Brief, p. 12) is entirely alien to the question of whether its answer and counterclaim presented a case for cancellation by the trial court or one for trial by jury on all available issues of fraud. This depended on procedural and jurisdictional requirements and limitations of the forum, matters expressly excluded from the operation of state law under the doctrine of *Erie* v. *Tompkins, supra.* In a subsequent decision, *Russell* v. *Todd,* 309 U. S. 280, 286 (1940), rehearing denied 310 U. S. 658 (1940), this Court said:

> "The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state

courts afford. *Di Giovanni* v. *Camden Fire Insurance Ass'n.*, 296 U. S. 64; *Atlas Life Insurance Co.* v. *Southern, Inc.*, 306 U. S. 563. And the jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice. *Stratton* v. *St. Louis, S. W. Ry. Co.*, 284 U. S. 530, 534."

Petitioner argued below and also urges upon this Court that the District Court in New Jersey is bound to grant the equitable remedy of cancellation, the United Sates Constitution, the acts of Congress, the Federal rules and the decisions of this Court notwithstanding. The Circuit Court of Appeals in rejecting this contention correctly distinguished between *substance* and *procedure* and held that the substantive law of New Jersey on fraud in the procurement of insurance would be applied in a trial before the District Court and a jury, the legal remedy for such fraud being adequate in the Federal courts. The decisions of this Court in insurance cases supporting this ruling are cited under Point III, *infra.*

It is a basic principle that even though legal remedies in the Federal courts may sometimes be modified to suit changes in the laws of the states, the remedial right to proceed in the Federal courts sitting in equity cannot be enlarged by state law. *Russell* v. *Todd, supra, Whitehead* v. *Shattuck*, 138 U. S. 146 (1891); *Scott* v. *Neely*, 140 U. S. 106 (1891); *Cates* v. *Allen*, 149 U. S. 451 (1893); *Mississippi Mills* v. *Cohn*, 150 U. S. 202 (1893); *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 (1923).

In *Whitehead* v. *Shattuck*, *supra*, complainant out of possession of land filed a bill in equity to quiet title. Under

local Iowa law, such an action was maintainable. However, this Court held that the bill should be dismissed on the ground that complainant had a plain, adequate and complete remedy at law by way of ejectment. After discussing § 16 of the Judiciary Act and the Constitutional Amendment preserving trial by jury, this Court said (at p. 152):

> "* * * an action like the present can be maintained in the courts of that State, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that State cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

As a result of the foregoing principles, "A Federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court." *Pusey & Jones Co.* v. *Hanssen, supra.*

Matters respecting the remedy are governed by the *lex fori.*

Central Vermont Ry. Co. v. *White,* 238 U. S. 507, 511 (1915);
Johns v. *Wilson,* 180 U. S. 440 (1901);
Willard v. *Wood,* 135 U. S. 309 (1890);
BEALE, CONFLICT OF LAWS (1935) Vol. I § 8A.28, pp. 85, 86.

Likewise the question of whether an issue is to be tried by court or jury is a procedural one governed by the *lex fori.*

BEALE, CONFLICT OF LAWS, Vol. III, § 594.1, p. 1607;
The Restatement of the Law of the Conflict of Laws (1934), § 594, p. 709;
Diederich v. *American News Co.*, 128 F. (2d) 144 (C. C. A. 10th, 1942);
Hollingsworth v. *General Petroleum Corp of California*, 26 F. Supp. 917 (D. C. Oregon, 1939).

POINT II.

The Circuit Court of Appeals did not decide a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

Under this point respondents will deal with ground (b) advanced by petitioner for the granting of the writ (Petition, p. 4) and Point II of its argument which is captioned, "This Court has held that in diversity of citizenship cases, except where a Federal statute governs, a Federal Court, whether trial or appellate, must do exactly what a State Court sitting in its place would do with the questions before it". This statement is based on a misconception of the doctrine of *Erie* v. *Tompkins, supra,* and of subsequent cases applying it. It ignores the limitations imposed on the Federal Courts by the United States Constitution and the Judiciary Act. It disregards the qualification expressly stated in this Court's opinion in *Erie* v. *Tompkins* at p. 78: "*Except in matters governed by the Federal Constitution or by Acts of Congress,* the law to be applied in any case is the law of the State".

In *Black & Yates, Inc.* v. *Mahogany Ass'n, Inc.*, 129 F. (2d) 227 (C. C. A. 3rd, 1942), *cert. den.* 317 U. S. 672 (1942),

the same point was presented. The cause of action arose in Delaware, which like New Jersey, has separate courts of equity and law. It was urged that since an injunction would on the facts be granted by the Delaware Chancery Court, it followed that under *Erie* v. *Tompkins*, the Federal court sitting in that state must likewise give such relief. The Circuit Court, on appeal said (p. 233):

> "There is no doubt that the substantive law of Delaware gives the person who has received legal injury a right of action for trade libel or disparagement of goods. The question which we must decide therefore may be stated as follows: What is the remedy which may be granted in the District Court of Delaware? * * * The rule of *Erie R. Co.* v. *Tompkins* being determinative of substantive rights, there is still preserved to the federal courts a uniform basis for granting equitable remedies in cases in which substantive rights have arisen under state law."

Other cases applying *Erie* v. *Tompkins* and distinguishing between substantive rights and the remedies available in the Federal Courts are *Maxwell* v. *Enterprise Wall Paper Mfg. Co.*, 131 F. (2d) 400 (C. C. A. 3rd, 1942); *The Maccabees* v. *City of North Chicago*, 125 F. (2d) 330 (C. C. A. 7th, 1942) *cert. den.*, 317 U. S. 693 (1943); *First Camden National Bank & Trust Co.* v. *Aetna Casualty & Surety Co.*, 132 F. (2d) 114 (C. C. A. 3rd, 1942) *cert. den.* 63 S. Ct. 1157 (1943).

The cases cited by petitioner on pages 13-15 of its brief are not in conflict. They all recognize the distinction between the obligation to apply state substantive law and the availability of the same remedies in the Federal courts as are granted by state courts.

POINT III.

The ruling below is in harmony with a long line of insurance decisions by this Court involving the issue of fraud.

A.

The rule concerning fraud in the procurement of insurance policies prior to *Erie* v. *Tompkins* and the new Rules of Civil Procedure.

The Circuit Court of Appeals applied the rule supported by a long line of decisions of this Court that "in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy'." (R. p. 75, 137 F. (2d) 62, 65.)

This rule has its sources in (1) the Seventh Amendment to the Constitution providing that in suits at common law, where the value in controversy exceeds $20.00, the right of trial by jury shall be preserved, and (2) in § 16 of the Judiciary Act of 1789 providing that suits in equity shall not be maintained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law. (28 U. S. C. § 384, Judicial Code § 267.)

The Court, in applying the foregoing provisions, early enunciated the principle that "whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury". *Hipp* v. *Babin*, 19

How. 271, 278 (1857); *Grand Chute* v. *Winegar,* 15 Wall. 373, 375 (1873); *Lewis* v. *Cocks,* 23 Wall. 466, 470 (1874); *Root* v. *Railway Co.,* 105 U. S. 189, 212 (1881); *Killian* v. *Ebbinghaus,* 110 U. S. 568, 573 (1884).

That principle has consistently been applied to insurance cases involving the issue of fraud in the procurement of policies. *Phoenix Mutual Life Ins. Co.* v. *Bailey,* 13 Wall. 616 (1871) is one of the early leading cases in which, following comprehensive consideration of all pertinent materials, this Court held that after the occurrance of the loss insured against and in the absence of special circumstances of a *quia timet* nature (none of which are alleged or involved herein), fraud in the procurement of a policy is provable only as a defense in an action at law on the policy in the Federal courts and that the insurer may not obtain the equitable relief of cancellation. This rule was subsequently applied in *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288 (1903); *Enelow* v. *N. Y. Life Ins. Co.,* 293 U. S. 379 (1935); *Adamos* v. *N. Y. Life Ins. Co.,* 293 U. S. 386 (1935); *DiGiovanni* v. *Camden Fire Ins. Ass'n,* 296 U. S. 64 (1935); *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203 (1937).

No distinction has been drawn between equitable and legal fraud. *Livingston* v. *Maryland Ins. Co.,* 6 Cranch 274 (1810); *M'Lanahan* v. *Universal Ins. Co.,* 1 Pet. 170 (1828); *Prudential Ins. Co. of America* v. *Moore,* 231 U. S. 560 (1913). Although such a distinction was urged upon it by counsel in the *Enelow, Adamos, DiGiovanni* and *Stewart* cases, *supra,,* this Court has not differentiated between the several types of fraud in passing upon the adequacy of the legal remedies in the Federal courts and in refusing to allow the equitable relief of cancellation without special circumstances of a *quia timet* nature.

B.

The Federal rule concerning fraud in the procurement of insurance has not been altered by *Erie* v. *Tompkins* and the new Rules of Civil Procedure strengthen its rationale by eliminating certain *quia timet* grounds.

1. *The equity powers of the Federal courts, limited by § 16 of the Judiciary Act and the Seventh Amendment to the Constitution, are not enlarged by the doctrine of Erie* v. *Tompkins, supra.*

That the principle of the *Bailey* and other cases cited under the previous subdivision is still the law and was properly applied by the lower court to this case notwithstanding *Erie* v. *Tompkins* appears from the later decision of this Court in *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 570 (1939):

> "Ordinarily when the defense of fraud may be interposed to an action at law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law."

2. *Under the new Rules of Civil Procedure, most of the historic grounds for the cancellation of policies are no longer available to the insurer seeking such relief.*

The loss having occurred, an action on the policies having been commenced before they became incontestable and the Petitioner having joined issue, it is submitted that under the new Rules Petitioner has full protection against loss of legal defenses so that equitable relief is wholly unnecessary.

Rule 41 (28 U. S. C. following § 723c), subdivision (a), paragraph 1, governs voluntary dismissals without a court order, giving such right only where notice of dismissal is filed *before answer is served* or where a stipulation to that effect is entered into between the parties. Otherwise under paragraph 2, an action may not be dismissed at the plaintiff's instance save upon order of the court on conditions imposed upon it.

Professor Moore has considered the effect of this Rule on insurance policy suits:

> "Since the insurer's claim of fraud is a defense and not a counterclaim to an action begun by the beneficiary to recover the proceeds, (citing the *Enelow* and *Adamos* cases) protection must come, if at all, from the first sentence of paragraph (2). But this sentence, by eliminating voluntary dismissals as a matter of right, except as provided in paragraph (1), eliminates the former danger to insurers, for it is hardly conceivable that any court would permit a dismissal by the plaintiff of his claim where the defendant had pleaded the defense of fraud and dismissal might operate to deprive the defendant of such defense." (3 *Moore's Federal Practice* (1938) p. 3041.)

The possibility of loss of evidence and disappearance of material witnesses is nullified by the liberal provisions for the taking of depositions embraced in Rules 26-34 (28 U. S. C. following § 723c). These provisions, allowing the taking of the testimony of any party or witness by deposition upon oral examination or written interrogatories, including cross examination of deponents under the provisions of Rule 43 (b), the power to compel the attendance of witnesses by subpoena under Rule 45 and the use of dep-

ositions at trial in the absence of witnesses under Rule 26 (d) (3), completely overcome the dangers of loss of evidence formerly urged as grounds for cancellation.

Moreover, in insurance actions in the Federal courts there is now no need for an independent proceeding by way of counterclaim for cancellation. Rule 8 (e) (2), allowing defenses "on legal or equitable grounds or on both" to be pleaded, incorporates the practice under § 274 (b) of the Judicial Code (28 U. S. C. § 398). The *Enelow* and *Adamos* cases, *supra,* held that the equitable claims asserted by the insurers in their answering pleadings did not under § 274 (b) of the Judicial Code entitle them to a trial by a judge as Chancellor in view of § 16 of the Judiciary Act and the cases stemming from the *Bailey* case, *supra.* It follows that resort to a counterclaim is improper under the new Rules to achieve the same purpose. Inasmuch as Petitioner voluntarily removed to the Federal court the action instituted by the Respondents in the New Jersey Supreme Court, it is bound by the procedure of, and the constitutional and statutory limitations upon, the Federal courts and cannot resort to equivalents for the procedural steps which might have been available to it in the Court of Chancery of New Jersey.

POINT IV.

The decision of the Circuit Court of Appeals introduces no novel doctrines and cannot cause confusion.

Petitioner expresses the fear (Brief IV, p. 19) that confusion will result from the differences in procedure and practice which must be followed in insurance cases in the state courts and in the Federal District Court of New Jer-

sey. No such confusion can reasonably be anticipated even if such danger were material in determining an issue of jurisdiction and procedure. Members of the bar and particularly counsel for insurance companies will merely have to bear in mind that if they prefer the remedies obtainable in the Court of Chancery of New Jersey, they should not institute in, or remove to, the Federal court insurance actions in which, after the death of the insured, the defense of fraud in procurement of the insurance is to be asserted.

Petitioner asks how the Federal trial judge is to proceed (Brief, p. 21). The Circuit Court of Appeals has answered this question by stating that petitioner will have the benefit of all the New Jersey substantive law on fraud (R. p. 73, 137 F. (2d) 62, 64). The judgment entered on the verdict of the jury will be as dispositive of the controversy as an equity decree. Instructions applying state law to the effect that material false representations innocently made will avoid liability were submitted to a jury in *N. Y. Life Ins. Co.* v. *McCurdy*, 106 F. (2d) 181 (C. C. A. 10th, 1939), *cert. den.* 309 U. S. 656 (1940).

Real confusion would result were petitioner's argument adopted that under *Erie* v. *Tompkins* it is entitled to the same relief from the Federal District Court of New Jersey as is granted by the Court of Chancery of that state. The result would be that under *Metropolitan Life Ins. Co.* v. *Lodzinski, supra*, the District Court would be obliged to take jurisdiction of a bill charging conscious fraud, hear it without a jury and grant relief on proof of either legal or equitable fraud; and that under *Metropolitan Life Ins. Co.* v. *Babb, supra*, the District Court would on a bill disclaiming fraudulent intent hear the case without a jury and, upon the submission of proofs of intentional fraud, would be required to decree cancellation. Were these decisions to be considered part of the substantive law of New Jersey bind-

ing upon the Federal court, as petitioner argues, then the Judiciary Act and the Seventh Amendment can be nullified by state decisions, a wholly untenable suggestion.

Conclusion.

Petitioner has not established the existence of a substantial question on any one of the grounds assigned by it in its petition for certiorari. The Circuit Court of Appeals fully recognized the local law and the decisions of this Court. Long-settled doctrines are involved. From the standpoint of respondents, the only novel question is whether, with the insured unavailable to give his version of the alleged misrepresentations, their action to recover can be converted into a suit for cancellation of the policies by the mere expedient of charging fraud somewhat differently in the answer and counterclaim, but on the basis of the same questions and answers in the insurance application. This Court by the consistency of its application of the *Bailey* principle has indicated concern that an asset of such importance as insurance to the average family should not be lost, if the beneficiaries sue promptly after the insured's death, except by the verdict of a jury on the issue of fraud.

It is respectfully submitted that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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